Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

79-1512

IN THE SUPREME COURT
of the
UNITED STATES

No. A-633

MAXINE A. WESTOVER, ET UX.,
Petitioners
vs.
F. H. TOLEDO

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF FLORIDA

MAXINE A. WESTOVER
VEREL T. WESTOVER
Pro Se
P. O. Box 3261
Apollo Beach, Florida 33570

February 26, 1980

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Petitioners respectfully pray that a Writ of Certiorari issue to review the Order of Dismissal of the Supreme Court of Florida entered in the above-styled cause on October 2, 1979.

OPINION BELOW

The Order of the Supreme Court of Florida appears in Appendix 'A' hereto.

JURISDICTION

The Order of the Supreme Court of Florida was entered on October 2, 1979. On January 26,

1980 this Court issued its Order extending time to file Petition for Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Petitioners were denied due process of law by the dismissal of their appeal.

2. Whether Petitioners were denied equal protection of the law by the dismissal of their appeal.

CONSTITUTIONAL PROVISIONS

Fifth Amendment: "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property privately owned be taken for public use without just compensation."

Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This Petition arises from the dismissal of Petitioner's complaint alleging medical malpractice against F. H. Toledo. The dismissal was granted on the ground that the suit was barred by the Statute of Limitations. The Order of Dismissal was rendered on February 7, 1978.

On March 6, 1978 Petitioners filed their Notice of Appeal to the Florida District Court of Appeal, Second District. Said Court rendered a per curiam decision without an opinion affirming the order of the Trial Court. Petitioners filed a Motion for Rehearing on July 14,1979. On August 27, 1979 the Second District Court of Appeal denied the motion, and a copy of its Order was mailed to Petitioners on the same date.

On September 25, 1979 Petitioners filed their Notice of Appeal with the Clerk of the Supreme Court of Florida. The notice was mailed from Tampa, Florida on September 23,1979, as was a copy to the Second District Court of Appeal. On September 27, 1979 the Second District Court of Appeal received its copy of the notice. On October 2, 1979 the Supreme Court of Florida dismissed the appeal as not timely filed.

REASONS FOR GRANTING WRIT

Rule 9.040(b), Florida Rules of Appellate Procedure says that if a proceeding is commenced in an inappropriate court, that court shall transfer the cause to the appropriate court. Rule 9.110(b) states that the notice of appeal shall be filed with the Clerk of the lower tribunal.

Petitioners were seeking to appeal the Order of the Second District Court of Appeal, which was rendered on August 27, 1979. On September 23, 1979, Petitioners mailed their notices of appeal to

the Supreme Court of Florida. On September 25, 1979, within the thirty day limit for filing, the Clerk of the Supreme Court stamped the notice as filed. On the same day, September 23, 1979, Petitioners mailed copies of the notice to the Second District Court of Appeal and the Circuit Court of the Thirteenth Judicial Circuit. On September 27, 1979 the Clerk of the Second District Court of Appeal filed the notice.

Even if the notice was not received by the Second District Court of Appeal until September 27, it was received by the Supreme Court on September 25. Under Rule 9.040 the Clerk of the Supreme Court was obligated to transfer the notices of appeal to the Second District Court of Appeal. Instead of doing so, Petitioner's appeal was dismissed on October 2, 1979.

The Supreme Court of Florida's dismissal of Petitioners' appeal violated their rights to due process and equal protection. Even though states are not obligated to provide a right of appeal, if they do, the appeal process must be exercised without discrimination. Durrough v. Estelle, 497 F.2d 1007 (5th Cir. 1974).

Also, Rule 9.420(d), Florida Rules of Appellate Procedure states that whenever a party is required to do an act within some prescribed time after service of a document, and the document is served by mail, five days shall be added to the prescribed period. Since Petitioners were mailed the August 27th order of the Second District Court of Appeal, five days should have been added to the time they had to appeal. The addition of the five days would have given them to October 1 to file the notice of appeal. The notice to the Second District Court of Appeal was filed on September 27, 1979.

CONCLUSION

The Supreme Court of Florida failed to obey the Florida Rules of Appellate Procedure. In doing so they denied Petitioners' right to be heard on appeal. In doing so it violated Petitioners rights to due process and equal protection. For the above reasons, Petitioners respectfully request that a Writ of Certiorari issue to review the Order of the Supreme Court of Florida.

Respectfully submitted,

/s/

/s/

Maxine A. Westover
Verel T. Westover
Pro Se
P. O. Box 3261
Apollo Beach, Florida 33570

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to F. H. Toledo, M.D. c/o Roy B. Reynolds, Jr., Esquire, 15927 North Florida Avenue, Lutz, Florida 33549, this 26th day of February 1980.

/s/

/s/

Maxine A. Westover
Verel T. Westover

APPENDICES

Supreme Court of Florida

TUESDAY, OCTOBER 2, 1979

WESTOVER, MAXINE, et vir., Petitioner vs. F. H. TOLEDO, M. D., Respondent.	CASE NO. 57,794

It appearing to the Court that the notice was not timely filed, it is ordered that the cause is hereby dismissed sua sponte, subject to reinstatement if timeliness is established on proper motion filed within fifteen days from the date of this order. See Fla. R. App. P. 9.110.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

ner
CC: Hon. William A. Haddad, Clerk
Roy B. Reynolds, Jr., Esquire
Maxine Westover,

Exhibit "A"

Supreme Court of the United States

No. A-633

MAXINE A. WESTOVER, ET UX.,

Petitioners

v.

F. H. TOLEDO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of ~~counsel for~~ petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 29, 1980

/s/ Lewis F. Powell

Associate Justice of the Supreme Court of the United States

Dated this 26

day of January, 1980

Exhibit "B"